The Iowa Packing Company *and* Joseph L. Walsh, an attorney with Hedberg, Owens & Hedberg. Case 18–CA–16289–1

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 19, 2002, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Iowa Packing Company, Des Moines, Iowa, its officers, agents, successors and assigns shall take the action set forth in the Order.

[1] The Respondent also requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging employees for engaging in a protected work stoppage, we do not rely on the statements set forth in the seventh paragraph of Sec. II,B,3, of his decision, or on the statement in the preceding paragraph that: "To employees, it surely appeared that Respondent intended to conduct business as usual with the morning processing of the combo loins."

[3] Chairman Battista agrees with the judge's conclusion that the Respondent threatened employees with discharge in violation of Sec. 8(a)(1) by telling them that they would be considered as having voluntarily quit if they engaged in a work stoppage. Accordingly, he finds it unnecessary to pass on whether the Respondent additionally unlawfully threatened employees with discharge by telling them that "it might be bad for them" if they engaged in a work stoppage. In his view, this additional finding is cumulative and does not affect the remedy.

Dated, Washington, D.C. April 30, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Timothy B. Kohls, Atty., Minneapolis, Minnesota, for the General Counsel.

Kevin J. Driscoll and Brian L. Stowe, Attys., (Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C.), Des Moines, Iowa, for the Respondent.

Joseph L. Walsh, Atty. (Hedberg, Owens, & Hedberg, P.C.), Des Moines, Iowa , for Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Des Moines, Iowa, on August 13, 2002. Joseph L. Walsh, an attorney (Charging Party), filed the original charge on January 11, 2002, and an amended charge on January 18. The Regional Director issued a complaint and notice of hearing on April 19, 2002, alleging that the Iowa Packing Company (Respondent or Company) violated Section 8(a)(1) of the National Labor Relations Act, as amended, on July 12 and 13, 2001[1] by interrogating and threatening employees concerning their protected concerted activities, and by discharging ten employees because they engaged in protected concerted activities and by threatening employees that they would be discharged for that reason.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and Respondent, I have concluded that Respondent engaged in the unfair labor practices alleged based on the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Iowa corporation, maintains an office and place of business in Des Moines, Iowa, where it engages in slaughtering hogs and processing pork products. During the 2001 calendar year Respondent's gross revenues exceeded

[1] The relevant events here occurred in July 2001. If not shown otherwise, all dates hereafter refer to the 2001 calendar.

[2] The findings reflect my credibility resolutions based on various factors summarized by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388-390 (1949). I do not credit testimony inconsistent with my findings. Further specific credibility resolutions are addressed below.

$500,000 and its direct inflow exceeded $50,000. Based on its Des Moines operations, I find that the Board has statutory jurisdiction over this labor dispute and that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this matter.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent slaughters hogs and processes the meat and by-products for shipment to its customers. Plant manager John Anderson oversees the plant operations with the assistance of staff and supervisory personnel. Charles Newton, the corporate director of human resources and safety, provided Anderson with staff support in connection with matters relevant to this dispute. At the time, Luis Moreno supervised the cutting floor workers.

When this dispute occurred, Respondent employed about 82 workers on the cutting floor. It provides each newly hired employee with an Employee Handbook and requires the employee to sign a receipt for it. The Employee Handbook provides that it is a "major offense" that "will result automatically in a suspension without any prior warning and after investigation of the facts and circumstances of the violation and your work and disciplinary record, can result in your immediate discharge" if the employee causes "a work or line stoppage when not necessary for the production process or for employee safety." See Joint Exhibit 1(a), pp. 26–28. In addition, the Employee Handbook provides that a dismissed employee is "not eligible for reemployment. . . ." Joint Exhibit 1(a), p. 10.

Employees assigned to the slaughtering, cutting and boning, packaging, shipping, cold storage, and security and maintenance departments perform Respondent's production functions. The local production begins with unloading, weighing and sorting live animals purchased from farmers or other producers into holding pens. Following an inspection by USDA inspectors, the animals are transferred to the slaughter floor where they are killed, dressed and hung in the carcass cooler for 24 hours. After that, employees on the cutting floor cut and bone the cooled carcasses and these products are then packaged for shipment to customers or placed in cold storage if not shipped immediately. From time to time, Respondent also processes pork loins from animals slaughtered and broken down at its Chicago plant and sent to the Des Moines plant in refrigerated trailers. This outside work arrives in round boxes called "combos" that contain about 2000 pounds of loin each. The combo work primarily involves cutting, boning, and packaging pork loins for shipment to customers. This type of outside work is almost never put on the line while the regular kill is in progress.

Over the years Respondent has maintained a so-called "guaranteed pay" policy.[3] Under this policy, workers on the production and maintenance crew receive notice on Friday that the following week will be either a guaranteed four or a five-day workweek. If the former, Respondent guarantees pay for 32 hours to the entire crew subject to a number of overall and individual conditions set forth in its employee handbook; if Respondent schedules the crew for a five day week, it guarantees pay for 36 hours. In both instances, Respondent pays employees for the amount of the guaranteed time even if they do not actually work that number of hours. By way of example, employees who meet all of the established conditions may earn 36 hours pay even though the crew might actually work 34 hours. Generally, however, Respondent provides enough production to keep the crew busy at least for the guaranteed number of hours.

Normally the crewmembers may close out their workday and leave upon completion of the daily production run. However, individual crewmembers may volunteer to perform other tasks after completing the daily production run or by working on the weekend. In this manner, employees earn extra pay over and above the guarantee. All parties agree general cleaning, painting, lawn maintenance, and other miscellaneous tasks fall in this extra-work category. In the past some cutting floor employees also remained behind after completing the normal in-plant production to work on the combo loins from the Chicago facility and to do other "rework" on Des Moines products. Plant manager Anderson claimed that the combo work and the in-plant rework had always been a part of the regular production covered by the guarantee.

However, two cutting floor employees, Orlando Ortiz and Jose Muniz, disputed Anderson's claims concerning the Chicago combo work and I find their testimony on this point credible. The change occurred, according to Muniz, at the time that supervisor Moreno began putting the combos out when the crew first started in the morning. In this way, it became integrated into the work expected under the Company's guaranteed hours system rather than extra work performed at the end of the day by volunteer crew members. Each asserted that the Company recently changed its procedure for processing the combo work. According to Muniz, several workers wanted management to revert back to its previous procedure followed for the six or so years he had worked at the plant so those employees would have the opportunity "to make better money."

On July 11, Muniz and several other cutting floor employees refused to return to work after the morning break until they met with plant manager Anderson. Because Anderson was unavailable at that time, Muniz agreed for the group to meet with Anderson after production ended that day. Anderson, in turn, arranged to have human resources director Newton and the kill floor supervisor, Galino Vega, present. Vega served only as an interpreter. Anderson asked Newton to attend because he "had some pay issues with employees." Anderson used Vega as the interpreter he knew the employees also had issues concerning supervisor Moreno.

At the outset of the July 11 meeting, employees (principally Muniz, Ortiz, and Abelino Mercado) asked for the Company to increase the top wage rate and to return to the practice of processing the combos outside the guaranteed time at the end of the plant's regular production day.[4] The overall aim of these proposals sought to increase employee pay. As earlier suggested, this latter proposal meant that the work would result in pay over and above the guarantee because it would be performed by

[3] The pay guarantee plan is outlined in the Employee Handbook. See Employee Handbook, Jt. Exh. 1(a), p. 12.

[4] Estimates about the number of employees in attendance varied from 10 or 15 on the low side to 40 or so on the high side.

crew members who volunteered to remain after the local production day ended. Anderson defended the process by which the Company dealt with the combos saying that they were "special orders" that needed to be done. Some employees also complained of perceived mistreatment by Moreno, the cutting room supervisor. According to Muniz, Moreno had a habit of yelling orders to employees in disrespectful terms; he claimed some women workers would burst into tears as a result of Moreno's harsh treatment. In the midst of the meeting, Anderson received information about a mechanical break down on the kill floor that caused him to terminate the meeting. Before leaving, however, he arranged to meet with the employees again at the end of the following workday and promised to have some answers to problems discussed by the employee group.

Before meeting with the employees on July 12, Anderson said he conferred with company vice president Chet Coolbaugh and human resources manager Newton about the demand to process the Chicago combo work outside at the end of the regular production day outside the guaranteed time. Later, at the July 12 meeting, Anderson claims that he told the ten or so employees present that the Company would make every attempt in a 36-hour guarantee situations to hold the loins and the local rework until the crew completed its regular cutting and processing so that the employees who volunteered to perform this work would be paid over and above the 36-hour guarantee.

Although Anderson thought employees seemed pleased with the Company's concession concerning the Chicago combo work, other evidence which I credit suggests that Anderson hedged to the point of indicating to at least some of the workers that little, if anything, would be done about the combo work. For example, Ortiz recalled that Anderson told employees the Company "couldn't do nothing" about the combo loins, "[t]hey were not going to change the work, the conditions," and if the workers "didn't want to work they could go home." Muniz too said that Anderson told them "[n]othing is going to be changed." Vega, the kill floor supervisor who interpreted, recalled that Anderson told employees that if there were only two or three combos they would be done in the morning but if there was a whole load (a load consists of 20 combos) they would be held until the local regular production had been completed in the afternoon and employees would be paid above the guarantee.

To the extent that Anderson may have made concessions to the employees, he apparently failed to mollify several workers present at the July 12 meeting. Anderson recalled that at the end of the meeting Abelino Mercado told him that the employees would walk off if management put one more loin on the line during regular production time. Ortiz recalled that several cutting floor workers said they would walk out. Muniz said employees told Anderson there would be a reaction from the workers but they did not say what. Moreno had joined this meeting late but overheard the employees threaten to walk out. Anderson responded to the walkout threat by asking who would walk out. Either Mercado or Muniz stated: "[W]e are all going to walk out." Anderson then told the employees that "[t]his meeting is over" and left. Human resources director Newton remained behind and asked Vega to stay also. He then told the employees through Vega that if they walk out "they will be considered voluntary quit" and that they would be replaced. Newton then told the employees that the Company was not "refusing to meet with them on any of their demands" but as of then the meeting was over.[5]

Shortly after the July 12 meeting, Moreno spoke with Muniz in the cafeteria. During their discussion, Muniz explained to Moreno that the cutting floor workers wanted to process the combo loins after the in-plant hog production "because it would get them more pay." Elsewhere, Anderson stopped Ortiz, Mercado and other employees in the plant parking lot. Anderson began talking with Mercado while the others listened. He asked Mercado why they were talking about walking out and told the employees that if they walked out "[i]t might be bad for them."

The dispute quickly came to a head when a walkout occurred the following morning. Moreno and Anderson claim that when the slasher machine broke down early on July 13 Anderson authorized Moreno to put out combo loins for processing. According to Anderson, the normal cutting floor work cannot proceed without an operable slasher machine.[6] Purportedly, he okayed "throwing the loins" in order to prevent idling the 82 cutting floor employees as well as 60 more employees in the packaging room for the hour or so that would be required to fix the slasher machine. In sum, Anderson claims that he okayed work on the loins so this large group of employees would not be "getting paid for standing around doing nothing."

The timing of the July 13 events suggests that only a little of the regular in-plant production occurred that morning before the combo loins came on to the line. Muniz claims that the loins were ordered out at around 6:45 a.m., about fifteen minutes into the shift. Newton confirms Muniz' sense of the time; Anderson, Newton said, summoned him to the cutting floor scene that morning and he estimated that he arrived there about 7:15 a.m. Ortiz recalled that Moreno removed him from his usual station and ordered him to begin putting out the loins. No one told employees about the broken slasher machine and, seemingly, no one told employees that the combo loin work would only go on for an hour or so until mechanics completed repairing the slasher machine.

Trouble quickly came. About 10 minutes after the loins came out, Moreno yelled at Muniz "in a bad way" to pass the loins on to another line. Muniz reacted to Moreno's manner by walking away from the line. He said he left the line in order to seek a "solution," to find out why they were doing this after what had been said in the meetings. As he started to walk toward Moreno, the supervisor told him: "Go to office, get your check and leave." Anderson, in turn, asked Muniz for his equipment, another sign that his employment had ended. Ortiz started to follow Muniz and he too was told to get his check and leave. Several others then began to walk away from the line.

[5] At the July 13 meeting discussions about increasing the top wage rate dropped by the wayside and virtually nothing is known about Anderson's reaction to complaints concerning Moreno's supervisory style.

[6] Employees cut and bone product along four main lines on the cutting floor. These lines then feed into a single line where other employees feed the trimmings from the cutting and boning process into the slasher machine that cuts them into smaller pieces for packaging.

Both Anderson and Moreno "start[ed] telling them if they walk out they will lose their jobs." This caused some to return to work but others did not. Newton described the turmoil when he arrived this way: "John [Anderson] was there. Chet [Coolbaugh] was there. I didn't see Luis [Moreno], and I said, 'Who walked out?' John threw up his hands–I don't know–he just was in a frenzy." Newton said that he positioned himself near the time clock. When the group came out of the locker room he asked to speak with them but they walked by him and on out of the plant.[7] All told, the following nine employees left with Muniz: Maria Contreras, Abelino Mercado, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez. Nothing shows that these employees were discourteous or disorderly in any manner.

Some or all of the employees who walked out went to the office of Elizabeth Salinas, an administrator at the Division of Latino Affairs in the Iowa Department of Human Rights. Muniz again explained that the purpose of this visit was to seek a "solution." Salinas called Anderson on their behalf and, following her telephone conversation, she told Muniz that Anderson would be willing to meet with the employees but not as a group.

Newton claims to have hired seven replacement workers on Monday, July 16. That same morning Muniz called the Company and asked to meet with Anderson. He was given an afternoon appointment. When he arrived at the plant, Muniz met Anderson and Newton. Muniz asked if he had been fired. Newton claimed that he explained to Muniz "over and over and over again" to Muniz that he had not been fired. Finally, Muniz asked if he could get his job back. Newton explained that they wanted to "talk to the rest of the people before we made a decision on that." However, that decision never happened. Newton explained that shortly thereafter the Company "started getting bombarded with lawsuits and unemployment claims" so he told Anderson "that we'd better not make a decision any way on this [returning the ten employees to work] because we are going to be wrong either way we do it." In addition to Muniz, two others who walked out on July 13 also called the plant but did not arrange an in-person meeting.

On July 17, Moreno completed "Status/Payroll Change Reports" for all employees who walked out the previous Friday. In the space provided to show the reason for the change, he checked the "Discharged" box. Below that in the space provided to list a reason, Moreno wrote in his own hand: "Walk off the line." He listed July 16 as the effective date of the status change. These forms in turn resulted in the generation of a separate computer form kept in the employee's personnel file. The attendance section of this latter form also reflects that the employee had been discharged for walking off the line. Moreno claimed that he had no authority to discharge employees and that he never told any July 13 strikers that he or she was discharged. He claimed that he completed the form as he did simply so the personnel office would remove them from the regular payroll and "and get new personnel in there." As far as Newton was concerned, the ten employees had voluntarily quit their employment. To date, none have returned to work.

[7] Muniz recalled that the employees followed him to the cafeteria where they remained briefly before leaving the premises.

B. Further Findings and Conclusions

Section 8(a)(1) provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 provides in pertinent part that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all such activities. . . ." [Emphasis supplied.] Section 10 of the Act empowers the NLRB to prevent unfair practices affecting commerce.

1. *The Rule Banning Work Stoppages*. The General Counsel argues that the Company violated Section 8(a)(1) by maintaining a rule that prohibits all work stoppages save for those "necessary for the production process or for employee safety." He contends that the rule, contained in the widely-distributed Employee Handbook, runs afoul of Section 8(a)(1) because it fails to distinguish work stoppages protected by Section 7 from those not protected and because it provides for the immediate discharge of employees who violate the rule.

Respondent appears to rely on Newton's testimonial claim that its rule banning work stoppages does not apply to protected concerted activities and that Respondent did not rely on the rule when the July 13 work stoppage occurred.

The Board has held that blanket prohibitions against work stoppages, i.e., those that fail to distinguish between protected and unprotected work stoppages, violate Section 8(a)(1). Respondent's work-stoppage rule amounts to the type of overly broad ban the Board prohibits. *Sani-Serv, Division of Catalox Corp*., 252 NLRB 1336, 1339 (1980).

I reject Respondent's claim it never intended to bar protected activities by maintaining its rule. Nothing in the rule's language suggests that interpretation and any reliance on an agent's self-serving claims concerning the rule's intent would effectively alter the legal test applicable under Section 8(a)(1). In measuring an employer's conduct under that provision, the Board and the courts employ an objective test that seeks to determine only whether the conduct at issue reasonably tends to interfere with employees' exercise of their Section 7 rights. *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980). Plainly, by maintaining and widely publishing broad work stoppage ban, punishable by discharge, an employer interferes with the free exercise of Section 7 rights. Accordingly, I find Respondent violated the Section 8(a)(1), as alleged, by maintaining its work stoppage rule.

2. *The July 12 Threats*. Complaint paragraphs 4(a) and 4(b) allege that plant manager Anderson interrogated employees concerning their protected concerted activities and that he threatened employees with discharge and other unspecified reprisals if employees engaged in protected concerted activities. These allegations pertain to Anderson's remarks to employees Abelino Mercado and Orlando Ortiz in the parking lot follow-

ing the July 12 meeting.[8] Complaint paragraph 4(c) alleges that human resources director Newton unlawfully threatened employees when he told them that they would be considered to have quit and would be replaced if they engaged in a work stoppage. This allegation references Newton's admitted remarks at the conclusion of the July 12 meeting.

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." A statement loses its protected character under Section 8(c) as a reasonable prediction based on available facts and becomes a threat of retaliation where there is "any implication" that an employer may or may not take action solely on his own initiative for reasons known only to him and unrelated to economic necessities. *Gissel Packing Co*., 395 U.S. 575, 618 (1969).

Anderson's parking lot remarks on July 12 ("it might be bad for them") clearly relates back to Mercado's statement at the end of the meeting that employees might walk out if Respondent continued to put out the combo loins before the end of the regular production. As Anderson abruptly terminated the meeting and left after Mercado's remark, employees could reasonably perceive that Anderson's had become angered by Mercado's walkout statement and that his utterance in the parking lot amounted to a retaliatory threat rather than a reasoned prediction. For these reasons, I find Respondent violated Section 8(a)(1) as alleged by Anderson's threat in the parking lot on July 12.

I have also found that Newton's threat at the end of the July 12 meeting to treat employees who walk out as having quit to be unlawful. The Board and the courts consider such statements as tantamount to threats of discharge. *Conair Corp*., 261 NLRB 1189, enfd. in relevant part 721 F.2d 1355 (D.C. Cir 1983). And see *NLRB v. Comfort, Inc*., 365 F. F.2d 867 (8th Cir. 1966)–notices to strikers that they were deemed to have quit their employment is tantamount to notice of discharge regardless of the nomenclature used. Viewed in this manner, Newton effectively threatened to discharge employees if they walked out as they threatened. Accordingly, I find Respondent violated Section 8(a)(1), as alleged, by Newton's "quit" remarks to employees at the July 12 meeting.

3. *The July 13 Walk Out.* Complaint paragraph 4(d) alleges that Anderson and Moreno violated Section 8(a)(1) by telling employees on July 13 that they were discharged or considered to have quit because of their protected concerted work stoppage. Complaint paragraph 5 alleges that Respondent discharged ten named employees in violation of Section 8(a)(1) because they engaged in protected concerted activities.

The General Counsel argues that the ten employees engaged in a strike on July 13 to press their demand for more pay for the work they perform, i.e., they wanted to be paid additional compensation for processing the combo loins. According to the General Counsel, the employees withheld their services to pressure Respondent into acceding to their demand over pay. Relying on *Asplundh Tree Expert Co.,* 336 NLRB No. 116 (2001), the General Counsel contends that this work stoppage in support of the employee pay demand was protected under the Act and that Respondent violated Section 8(a)(1) by discharging the ten employees who walked out on July 13.

Respondent claims that it did not discharge the employees. Instead, it argues in its brief that "Iowa Pack's position has consistently been that the claimants voluntarily resigned as a result of walking off the job." [Respondent's Brief, page 9, paragraph 55] In addition Respondent claims that the employees were engaged in an intermittent, or partial strike because they refused to work on the combo loins except on their own terms, meaning at the end of the day after the local cutting floor work had been completed or on an "overtime" basis. Pointing to rationale in *NLRB v. Mike Yurosek & Sons, Inc*., 53 F.3d 261 (9th Cir. 1995) and *Audubon Health Care Center*, 268 NLRB 135 (1983), Respondent claims that the July 13 walk out was not protected because it amounted to an attempt by the employees to set their own conditions of employment.

The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963); *Montefiore Hospital*, 621 F.2d 510 (2d Cir. 1980). However, the right to strike is not absolute. Concerted activity that is unlawful, violent, in breach of contract, or other wise indefensible is not protected under Section 7. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). A group protest by employees concerning their wage rates and other conditions of employment constitutes protected activity. *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626 (10th Cir. 1984). The Act also protects a concerted work stoppage to protest a supervisor's attitude. *Quality C.A.T.V., Inc*., 278 NLRB 1282 (1986). An employer violates the Act by discharging employees for exercising their right to engage in protected concerted activities. *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989).

At the outset, I specifically reject Respondent's characterization of this overall dispute as an attempt by the employees to dictate their own terms of employment. On the contrary, this was a pay dispute that grew out of a change recently made by Respondent whereby it began processing the combo loins in the morning by the whole crew and as a part of the regular production work subject to the guaranteed hours plan. As a result, the employees who regularly volunteered to remain after regular production to process the combo loins would have suffered a loss of pay. In the meetings, employees first spoke of increasing the top pay rate presumably to make up for the losses some had suffered when the morning processing of the combo loins started. Increasing the pay rate seems to have never been seriously considered, but returning to processing the combo loins by volunteers at the end of the day obviously received considerable discussion. Anderson even claims to have told employees more or less that the combo loins would be held to the end of the day unless there was an urgent customer need for them earlier. Although some employees found this to be unacceptable compromise, Respondent made no claim that the combo loin work on July 13 was customer driven.

[8] In his brief, General Counsel requested to withdraw the interrogation allegation at complaint par. 4(b). That request is granted.

I find Moreno's hostile directive to Muniz ten minutes after the combo loins came on to the line on July 13 triggered this work stoppage. Muniz credibly testified that he left the line only after Moreno had given him an order "in a bad way" for the purpose of seeking an explanation from Moreno and Anderson as to why they were doing this after these precise matters had been discussed during the meetings held on the past two days. To employees, it surely appeared that Respondent intended to conduct business as usual with the morning processing of the combo loins. I find that Muniz' acted within the protection of Section 7 at this precise time because his conduct logically grew out of the concerted activity at the two meetings. *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988); *Salisbury Hotel*, 283 NLRB 685, 687 (1987).

In my judgment, Respondent's managers and supervisors executed the production change on the morning of July 13 in such a foolhardy manner as to cause considerable doubt as to the purity of their claimed business motives. Even allowing for the ordinary severity of the slaughterhouse climate, the manner and tone of that morning comes close to suggesting a deliberate attempt to provoke a confrontation with the cutting floor employees. Where, as here, many of these employees had participated in meetings with Anderson the previous two days to grieve about, and threaten a walkout over, their perceived pay losses resulting from the change to processing the combo loins in the morning and the conduct of its allegedly insensitive, rough-edged cutting floor supervisor, it seems inconceivable that Anderson and vice president Coolbaugh could stand by on the cutting floor, as they appear to have done, while Moreno yelled orders to start work on the combo loins in his characteristically harsh manner and for a reason no one bothered to tell employees about.

If from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind an employee walk out, it may not penalize the employees involved without running afoul of Section 8(a)(1). *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1177 (8th Cir. 1982), quoting with approval from *South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977). Here, Anderson and Moreno effectively fired Muniz, one of the leading spokespersons at the meetings, as he was about to utter another protest about Moreno's harsh treatment, as well as the sudden and unexplained production change, seemingly inconsistent with what the Company agreed to the previous day. They discharged Ortiz shortly thereafter and began warning others who walked away that they would lose their jobs if they failed to return to work. The remaining employees who followed Muniz and Ortiz away from the line received an ultimatum to return to the line or lose their jobs. In sum, I find this evidence sufficient to cause the employees who walked out that morning to believe or infer that they had been discharged because of their protected concerted activity. *Pennypower Shopping News v. NLRB*, supra at 629; *Accurate Wire Harness*, 335 NLRB No. 91 (2001).

My conclusion that employees could reasonably infer that they had been discharged is also consistent with Respondent's overall conduct. Thus, its personnel records reflect the discharge of all ten. Despite the highly self- serving testimony elicited from Moreno to the effect that he lacked authority to discharge employees at the time he completed the Status/Payroll Change Reports, I find that these reports, at the very least, represent supervisor Moreno's own contemporaneous perception that all ten had been discharged because they walked out. In addition, Respondent persistently claimed, consistent with Newton's threat on July 12 that the employees quit by walking out, an assertion considered to be functionally equivalent to discharging employees who engage in a protected work stoppage. *Vanguard Tours*, 300 NLRB 250, 251, 254 (1990). Furthermore, when Muniz asked for his job back on July 16, Newton hedged and predicated his reinstatement on irrelevant considerations, i.e., Respondent's discussions with other employees. As Respondent admittedly hired at best only seven replacements by then, its apparent failure to accord Muniz' reinstatement request consideration under the *Laidlaw* doctrine[9] implies that Respondent did not believe that he had a striking employee's rights. Finally, Newton's admission that Respondent deferred any consideration of returning employees after being "bombarded with lawsuits and unemployment claims" essentially implies a permanent employment separation equal to a discharge. For these reasons, I find Respondent discharged the 10 employees who walked out on July 13.

Finally, Respondent's claim that the walkout represented an intermittent or partial strike lacks merit. Those who walked away from the line on July 13 left the plant in short order and in an entirely peaceful manner. No evidence supports the claim of a partial or intermittent strike. In *Polytech, Inc.*, 195 NLRB 695 (1972), the Board stated that a work stoppage may be found to be an unprotected intermittent strike if it is "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." The total work stoppage by the ten employees at issue does not meet that definition. I find, therefore, that Respondent failed to rebut the presumption that the work stoppage here was protected with evidence demonstrating that it was part of a plan or pattern of intermittent action. *St. Barnabas Hospital*, 334 NLRB No. 125 (2001).

Accordingly, for the foregoing reasons I find that Respondent violated Section 8(a)(1) on July 13 by discharging the ten employees named in the complaint because they engaged in protected concerted activity and by telling employees who followed Muniz and Ortiz that they would lose their jobs if they walked out.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. By maintaining a rule banning work stoppages protected by Section 7 of the Act; by Newton's "quit" statement to employees at the end of the July 12 meeting; by Anderson's threat in the parking lot on July 12; by telling employees that they would lose their jobs if they walked out on July 13; and by discharging Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, An-

[9] See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd 414 F.2d 99, cert. denied, 397 U.S. 920 (1970).

tonia Rodriguez, Isela Tapia, and Gerardo Velazquez because they engaged in protected concerted activity, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(1) of the Act.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully discharged Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez, my recommended order requires Respondent to offer each of these employees immediate and full reinstatement to their former position, or if that position no longer exists, to a substantially equivalent position, and to make each employee whole for any loss of earnings and other benefits. *Abilities and Goodwill, Inc*., 241 NLRB 27 (1979), enf. denied on other grounds, 612 F.2d 6 (1st Cir.) Backpay shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, my recommended order requires Respondent to expunge from its records any reference to the unlawful discharge of the employees named above and to notify each of them in writing that this action has been take as provided in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Respondent also will be required to expunge the current work stoppage rule from its Employee Handbook.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, The Iowa Packing Company, Des Moines, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that prohibits work stoppages protected by Section 7 of the Act.

(b) Threatening employees by informing them that they will be deemed to have quit their employment, that bad things will happen to them, or that they will lose their jobs if they engage in a work stoppage protected by Section 7 of the Act.

(c) Discharging employees because they engage in a work stoppage protected by Section 7 of the Act.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez whole for any loss of earnings and other benefits suffered as a result of their discharge on July 13, 2001, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful July 13, 2001, discharge of the employees named in 2 a and b, above, and within three days thereafter notify each of those employees in writing that this has been done and that this discharge will not be used against her or him in any way.

(d) Within 14 days from the date of this Order, notify each employee in writing that it will not give effect to the work stoppage rule in the Employee Handbook and physically expunge the rule from the current Employee Handbook before providing it to any other employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Des Moines, Iowa, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits work stoppages by a group of employees seeking to improve their wages, hours and other terms and conditions of employment.

WE WILL NOT threaten our employees by informing them that they will be deemed to have quit their employment, that bad things will happen to them, or that they will lose their jobs if they engage in a work stoppage that seeks to improve their wages, hours and other terms and conditions of employment.

WE WILL NOT discharge employees because they engage in a work stoppage protected by Section 7 of the National Labor Relations Act (Act).

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez immediate and full reinstatement to their former jobs.

WE WILL make Maria Contreras, Abelino Mercado, Jose Muniz, Orlando Ortiz, Maria Ortiz, Elsa Rocha, Maria Rodriguez, Antonia Rodriguez, Isela Tapia, and Gerardo Velazquez whole for any loss of earnings and other benefits suffered as a result of their discharge on July 13, 2001, together with interest as provided by law and WE WILL remove from our files any reference to their unlawful discharges and notify each of them in writing that this has been done and that this discharge will not be used against her or him in any way.

WE WILL notify each of our employees in writing that we will not give effect to the work stoppage rule in our Employee Handbook and we will physically expunge the rule from the current Employee Handbook before providing it to any other employee.

THE IOWA PACKING COMPANY